UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ADT, LLC **Respondent** **and** **INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCALS 46 AND 76** **Charging Party**	**CASE 19-CA-216379**

BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, ADT, LLC ("Respondent" or "ADT") respectfully files the following Brief in Support of Exceptions to the July 9, 2019, Decision of Administrative Law Judge ("ALJ") John T. Giannopoulos.[1]

I. Summary of Argument

The ALJ relied upon two flawed conditional statements to find Respondent's suspensions and discharges of Patrick Cuff and Mohamed Mansour (the "alleged discriminatees") violated the Act. Respondent discharged both individuals for violations of its concededly lawful No Recording Policy. The ALJ found these discharges unlawful pursuant to the following analysis:

[1] References to the ALJ's Decision are identified by the letter "D" followed by page and line number, e.g., "D. __:__." References to the hearing transcript are by the letters "Tr.", followed by page and line number, e.g., "Tr. __:__." References to exhibits introduced Jointly are by the letter "J", followed by exhibit number, e.g., "J-__."

1. If the alleged discriminatees' misconduct did not violate Washington state law, then their conduct also did not violate Respondent's No Recording Policy (D.15:31-37; 16:42-43); and

2. If the alleged discriminatees' misconduct did not violate Respondent's No Recording Policy, then their conduct enjoyed the protection of the Act (D.15:35-37; 16:41-44).

The logical gaps in each of these two statements resulted in the ALJ's erroneous Decision. Regarding the first statement, violations of Respondent's No Recording Policy do *not* depend upon a violation of state law. To the contrary, the Policy only establishes the existence of a state dual consent law as a condition precedent to its applicability. Where such a law exists, the Policy applies. The Policy does not, however, require that a technical violation of state law must occur in order for an employee to also violate the Policy.

Regarding the second conditional statement, the ALJ improperly assumes that employee actions only lack the protection of the Act if they violate the letter of their employer's policies, even if such determinations require cross-references to state court decisions. This assumption contravenes both the balancing of interests fundamental to the Board's role in the workplace, and Respondent's fundamental right to set reasonable terms and conditions of employment.

The ALJ's Decision rests upon two logical fallacies, and the failure of either premise constitutes an independently sufficiently basis for reversal. The Board must therefore find merit in Respondent's Exceptions and dismiss the Amended Complaint in its entirety.

II. Brief Factual Background

The parties generally do not dispute the facts of this case. With one contrary example discussed below (regarding Respondent's knowledge of a comparator employee's rule violation), Respondent agrees with the ALJ's description of the factual background in his Decision.

In short, Respondent maintains a policy prohibiting surreptitious recordings in states with dual consent laws (the "No Recording Policy"). (D.8:12–35). The State of Washington, where the

events of the instant charge took place, maintains such a dual consent law. (D. 9:22–23; 15:41–16:8); WASH. REV. CODE § 9.73.030. The General Counsel concedes the facial lawfulness of Respondent's No Recording Policy under *The Boeing Company*, 365 NLRB No. 154 (2017) ("*Boeing*"). (J-1(m)).

During a decertification campaign, Respondent conducted two mandatory meetings in which it lawfully communicated its views regarding the International Brotherhood of Electrical Workers, Locals 46 and 76 (the "Union"). (D.3:9–5:34). Alleged discriminatees Patrick Cuff and Mohamed Mansour each surreptitiously recorded a separate meeting. (D.5:4–37). Upon learning of these recordings, Respondent suspended Cuff and Mansour pending investigation, conducted its investigation, and eventually discharged both alleged discriminatees. (D.9:20–13:22).

III. The ALJ Improperly Relied Upon Evidence Relating to Respondent's Motives to Conduct Analysis Related to the *Res Gestae* of Purportedly Protected Activities.

In support of its contention that the Board must determine solely whether the alleged discriminatees engaged in activities protected by Section 7 of the Act, Respondent has excepted:

1. To the conclusion that ADT Director of Labor Relations Nixdorf did not learn of the discharge of another employee for surreptitious recordings prior to making the decision to discharge the alleged discriminatees (D.12:17–13:6), because this conclusion is irrelevant, contrary to substantial evidence in the record, and unsupported by the record.

As the ALJ correctly explains, in this case, "neither the *Wright Line* mixed-motive standard nor the *Burnup & Sims* mistaken-belief standard applies." (D.15:11–12) (citing *Desert Cab, Inc.*, 367 NLRB No. 87, slip op. at 1, fn. 1 (2019)) (internal citations omitted). Instead, because the General Counsel alleges Respondent suspended and discharged the alleged discriminatees for the same actions that formed the *res gestae* of purportedly protected activities, the protected or unprotected nature of the alleged discriminatees' conduct constitutes the sole question the Board must determine. Indeed, as the ALJ repeatedly acknowledges, ADT Director of Labor Relations

James Nixdorf, as the sole decision-maker, discharged the alleged discriminatees because he believed their admitted conduct clearly violated Respondent's No-Recording Policy. (D.12:5–14, 13:8-13; 15:28-31). Such lawful motives could not form the basis for a violation under the *Wright Line* or *Burnup & Sims* standards.

This narrow issue of protection renders irrelevant the ALJ's analysis of whether Nixdorf knew, at the time of his decision, that Respondent had discharged another employee for similar misconduct in New York. (D.12:17–13:6). Treatment of other employees could reflect upon Respondent's motives, or upon an allegation that Respondent enforced its policy discriminatorily. *Kentucky River Medical Center*, 355 NLRB 643 (2010). The outcome of this case, however, does not depend upon motives. Likewise, the General Counsel presented no evidence of inconsistent enforcement. Such reliance upon irrelevant issues, coupled with the two fundamental logical fallacies discussed below, undermine the validity of the ALJ's analysis.

Furthermore, even incorrectly assuming relevance, the ALJ erroneously concluded Nixdorf did not know of the New York employee's discharge. The ALJ's analysis rested upon cross-examination where the General Counsel utilized a position statement from the underlying investigation, which Nixdorf testified he did not recall reviewing. (D.12:39–13:6). Conversely, Nixdorf testified unequivocally regarding a pre-discharge conversation with another ADT executive about the New York employee. The ALJ erred in substituting his own speculative suppositions for Nixdorf's specific testimony.[2]

[2] Respondent further notes, as a general matter, the questionable efficacy of the General Counsel's use of position statements submitted during underlying investigations as "gotcha" devices for details at hearing. *Orland Park Motor*, 333 NLRB 1017, 1024–26 (2001). Moreover, as a policy matter, continued utilization of such tactics by the General Counsel will inevitably disincentivize charged party cooperation in Regional investigations.

Despite this irrelevant factual digression, however, Respondent agrees with the ALJ that the question of protection is dispositive. In that regard, the ALJ erred in both stages of a two-part logical approach. The ALJ posits, without any applicable legal support, that both:

1. If the alleged discriminatees' misconduct did not violate Washington state law, then their conduct also did not violate Respondent's No Recording Policy (D.15:31–37; 16:42–43); and

2. If the alleged discriminatees' misconduct did not violate Respondent's No Recording Policy, then their conduct enjoyed the protection of the Act (D.15:35–37; 16:41–44).

If either of these premises fail, then the ALJ's basis for finding any violation crumbles. As demonstrated below, both prongs of the ALJ's analysis require reversal.

IV. The ALJ Erroneously Equated the Purported Absence of a Technical Violation of State Law with Compliance with Respondent's No-Recording Policy.

In support of its contention that a violation of Respondent's No-Recording Policy does not depend upon a technical violation of Washington state law, Respondent has excepted:

2. To the ALJ's conflation of a violation of state law with a violation of Respondent's No-Recording Policy (D.15:31-37; 16:42-43), as contrary to the substantial evidence in the record, unsupported by the record, and contrary to law.

3. To the conclusion that the alleged discriminatees did not violate ADT's no-recording rule (D.15:31-16:44), because this conclusion is contrary to substantial evidence in the record and contrary to law.

The ALJ explicitly brings the fundamental flaw in his analysis to the surface at two junctures in his Decision:

> On its face, a violation of Respondent's policy occurs **only if** state law prohibits nonconsensual recording. Therefore, if the State of Washington prohibited such recordings, Cuff and Mansour's conduct would be both illegal and in violation of Respondent's policy; in these circumstances they both would lose the Act's protections. *Hawaii Tribune Herald*, 356 NLRB [661, 661 (2011)].

(D.15:31–35) (emphasis added).

> Therefore, neither Cuff nor Mansour violated Washington State law when they recorded the January 9 captive-audience meetings. And, **because their recordings were not prohibited by Washington State law, they did [not] violate Respondent's policy on recordings.** In these circumstances, neither Cuff nor Mansour lost the protection of the Act[.]"

(D.16:41-44) (emphasis added).

Initially, the ALJ's reliance upon *Hawaii Tribune Herald* is entirely misplaced. In that case, the employer **did not maintain any policy against recordings.** 356 NLRB at 661 ("Respondent had no rule barring such recording"). Thus, *Hawaii Tribune Herald* cannot support an analytical connection between a technical violation of state law on one hand, and violation of Respondent's No Recording Policy on the other.

More importantly, however, it is simply not true that the face of the No Recording Policy requires a state law violation in order for a Policy violation to occur. The Policy, in pertinent part, states:

> Audio or video recording of coworkers or managers is prohibited where (1) such recording occurs without explicit permission from all parties involved in those states with laws prohibiting nonconsensual recording[.]

(D.8:33-35).

Critically, the Policy does not prohibit recordings only where the recorder fails to obtain permission, the state prohibits nonconsensual recording, *and the failure to obtain permission actually resulted in a technical violation of the state's law*. Instead, the policy only asks: (1) Did the recorder obtain permission?; and (2) Does the state have a law prohibiting nonconsensual recording? The third requirement – an actual violation of the state's law – appears nowhere in ADT's policy. Instead, the ALJ read this third prerequisite to a violation into the policy *sua sponte*.

Removing the ALJ's own requirement that a technical violation of state law must occur, the Decision provides all the elements of a policy violation:

- Both Cuff (D.5:20–22) and Mansour (D.5:4–5) recorded a meeting;

- "[T]he State of Washington [i]s a two-party consent state." (D.9:22–23; 15:41–16:8) (*See also* WASH. REV. CODE § 9.73.030); and
- "It is not disputed that neither Cuff nor Mansour told anyone that they were going to record before they did so." (D.5:36–37).

Consequently, even if the alleged discriminatees did not technically violate state law, they still violated Respondent's No Recording Policy. As noted above, the General Counsel concedes the facial lawfulness of that Policy under *Boeing*. (J-1(m)). Respondent's discharges of the alleged discriminatees thus constituted lawful applications of a lawful policy. The Decision acknowledges that, if they did violate the Policy, the alleged discriminatees "both would lose the Act's protections." (D.15:33–34).

This error in the ALJ's application of Respondent's policy provides an independently sufficient basis for Board reversal of the Decision.

V. The ALJ Erroneously Equated the Purported Absence of a Technical Violation of Respondent's No-Recording Policy with Protection under the Act.

In support of its contention that the loss of protection under the Act does not depend upon whether the alleged discriminatees technically violated Respondent's No-Recording Policy, Respondent has excepted:

4. To the finding that the alleged discriminatees engaged in activities protected by Section 7 of the Act (D.14:2–16:44), because this finding is contrary to the substantial evidence in the record, unsupported by the record, and contrary to law.

5. To the finding that alleged discriminatee Patrick Cuff recorded a meeting in order to engage activities protected by the Act (D.14:29–41), because this conclusion is contrary to the substantial evidence in the record and unsupported by the record.

6. To the finding that alleged discriminatee Mohamed Mansour recorded a meeting in order to engage activities protected by the Act (D.14:2–27), because this conclusion is contrary to the substantial evidence in the record, unsupported by the record, and contrary to law.

7. To the conclusion that the International Brotherhood of Electrical Workers' ultimate receipt of the alleged discriminatees' recordings "is alone sufficient to establish the

union activities" of the alleged discriminatees (D.14:43–15:4), because this conclusion is contrary to substantial evidence in the record and contrary to law.

Other aspects of the ALJ's flawed conditional statements provide a second independent basis for reversal of the Decision. The ALJ stated:

> If not [in violation of state law], their conduct would be legal, **would not violate Respondent's policy**, and Respondent's actions in suspending and terminating them for recording the January 9 meetings would violate Section 8(a)(3) **as neither lost the Act's protection.**

(D.15:35-37) (emphasis added).

> Therefore, neither Cuff nor Mansour violated Washington State law when they recorded the January 9 captive-audience meetings. And, because their recordings were not prohibited by Washington State law, **they did [not] violate Respondent's policy on recordings.** In these circumstances, **neither Cuff nor Mansour lost the protection of the Act[.]"**

(D.16:41-44) (emphasis added).

The ALJ thereby assumes that, if the alleged discriminatees' actions did not technically violate Respondent's No Recording Policy, then their conduct automatically enjoyed the Act's protection. This contention, like the ALJ's mechanical interpretation of the policy itself, must fail.

A. The ALJ Fails to Establish Cuff and Mansour Engaged in Protected Activities.

The ALJ's analysis grows out of an initial conclusion that the alleged discriminatees engaged in protected activities. (D.13:28–15:4). It then asks, as in cases of employee outbursts under *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), whether Cuff and Mansour lost the Act's protection. (D.13:28–15:10). This, however, is not an *Atlantic Steel* case. Instead, ADT's legitimate property interests outweigh any Section 7 interests in surreptitious recordings, and that balance of interests deprives the recordings of protection *ab initio*.

As an initial matter, Cuff selectively chose to record his meeting, and later wielded it and Mansour's recordings to inform co-workers that he knew everything said in both meetings. (D.6:24–30). The purpose of these actions could only be to harass and intimidate co-workers who

may have supported decertification. The Act does not protect harassment and intimidation in the workplace. *Boeing*, 365 NLRB, slip. op at *15; *Foodtown Supermarkets*, 268 NLRB 630 (1984).

Similarly, Mansour concededly undertook his recording with no intent to involve himself in any group action or involve the Union. (Tr. 88:4–22; 95:2–13). The ALJ attempts to swerve around this fundamental problem by comparing Mansour to a hypothetical employee who "checked out a library book about unions so he could study the issues and make an informed choice" in an election. (D.14:12–13). This comparison fails, however, in three important respects: (1) the hypothetical employer has no rule against checking out library books; (2) the hypothetical employer (almost certainly) possesses no legitimate property interest in preventing employees from checking out library books; and (3) no Board law holds the hypothetical employee would enjoy protection for such an individualized action in any event.

Here, the property interests discussed extensively by the *Boeing* Board at **18–19 (as well as the "comparatively slight" impact of surreptitious recording prohibitions on Section 7 rights) factor heavily into the analysis. Those property interests apply with particular force to ADT because it is, after all, a ***security company***. ADT permits employees to check out library books. Library books to do affect its property interests. Surreptitious recordings in the workplace, however, can create significant problems, including breaches of technical security processes.

Moreover, the ALJ provides no applicable legal authority for the "library book" path to finding Mansour's actions protected. Instead, the Decision cites *Great Dane Trailers*, 293 NLRB 384, 392 (1989) and *Whole Foods Market Group, Inc.*, *v. NLRB*, 691 F.App'x 49, 51 (2d Cir. 2017). Neither case applies here. The *Great Dane* employer violated the Act by surveilling an employee who took notes during a meeting. The violation did not involve an adverse action, and the underlying conduct did not involve a recording.

Meanwhile, the Second Circuit in *Whole Foods* affirmed the Board's decision in *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015) that a grocer's no recording policy violated the Act. The continued viability of *Whole Foods Market* is in serious doubt after *Boeing*, and the Board maintains a policy of non-acquiescence to Court of Appeals decisions in any event. *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963). Furthermore, as a security company, ADT possesses greater property interests in prohibiting surreptitious recordings than grocers possess.

The ALJ also asserts that the Union's ultimate receipt of the recordings renders the alleged discriminatees' actions somehow automatically protected. (D.14:43–15:4). This claim resembles arguments that status as a union officer confers automatic protection. As the Board stated in *The Tampa Tribune*, 346 NLRB 369, 370 (2006), "[an employee's] actions do not automatically constitute 'union activity' simply because he also happens to be a union steward or official. In a variety of circumstances, the Board has distinguished between an individual's actions taken in his representation capacity and actions taken as an employee."

Meanwhile, the ALJ supports this assertion with a citation only to *Commerce Concrete Co., Inc.*, 197 NLRB 658, 660 (1972). There, the employer did not argue that any employees had violated any rules. Instead, the Trial Examiner, only "infer[red]" that the employer believed the employees had helped the union because they were "present in the [representation case] hearing room and [the employer] saw them with the Union's counsel." *Id*. at 659. Such circumstances do not establish that employees enjoy protection for obtaining materials in violation of employer rules simply because they later provide those materials to a union. See *Flagstaff Medical Center Inc.*, 357 NLRB 659, 662–63, 670 (2011) (upholding prohibition on photography despite context of organizing campaign and over dissenting argument of Member Pearce that such photographs could lead to Section 7 activities).

As a result, neither of the alleged discriminatees enjoyed the protection of the Act when they surreptitiously recorded Respondent's meetings.

B. Technical Compliance with Respondent's No Recording Policy Does Not Render the Alleged Discriminatees' Actions Protected.

The ALJ goes to great lengths to argue the alleged discriminatees did *not* violate Washington state law, including through reference to and analysis of the nuances of **five** state court decisions. (D.15:39–6:42) (citing *State v. Babcock*, 279 P.3d 890, 894 (Wash. Ct. App. 2012); *State v. Clark*, 916 P.2d 384 (Wash. 1996); *Kadoranian v. Bellingham Police Dep't*, 829 P.2d 1061 (Wash. 1992); *State v. Mankin*, 241 P.3d 421, 424 (Wash. App. 2010); *State v. Kipp*, 317 P.3d 1029, 1034 (Wash. 2014)). Such hyper-technical analysis of Respondent's policies far exceeds the role of the ALJ and the Board to determine whether the alleged discriminatees' surreptitious recordings enjoyed the Act's protection.

The question of protection has *never* depended upon legalistic interpretations of employer rules. Instead, protection rests upon a balance of the employer's property rights on one hand, with the employee's Section 7 rights on the other. For example, regardless of what its rules state, an employer may discipline an employee for engaging in otherwise protected activities on working time or in working areas. *Our Way, Inc.*, 268 NLRB 394, 394 (1983); *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945). [3]

In *MTD Products*, 310 NLRB 733, 733 (1993), the Board found an employer maintained an unlawfully overbroad rule against solicitation and distribution. Regarding a discharge under that rule, however, the Board found no violation. It explained the employer "would have discharged [the employee, who circulated a union petition], even in the absence of the unlawful

[3] Indeed, due to the inherent nature of mandatory meetings, both of the alleged discriminatees engaged in their purportedly protected activities on working time here.

rule and of her union activities, based on her unauthorized, insubordinate presence in a plant production area, with her child, and without required safety glasses." In other words, the *MTD* employer's legitimate property interests outweighed the employee's Section 7 interests in circulating the petition on the shop floor. Those property interests, rather than a mechanical application of the employer's solicitation and distribution policy, carried the day. See also *Dico Tire, Inc.*, 330 NLRB 1252, 1260 (2000) (upholding employer's discharge of the leading union supporter under a facially lawful but inconsistently enforced solicitation and distribution policy because the manner of the solicitation interfered with production).

Moreover, it is "well settled that the Board should not substitute its own business judgment for that of the employer in evaluating whether an employer's conduct is unlawful." *Framan Mechanical, Inc.,* 343 NLRB 408, 412 (2004). See also *Reno Hilton,* 282 NLRB 819, 837 fn.41 (1987) (observing, "we should take pains not merely to substitute our own business judgment—nor our abstract sense of fairness—for that which the employer may apply day to day.") (citing *FPC Advertising*, 231 NLRB 1135, 1136 (1977)).

Like the Board itself, Courts have long recognized that the Board's role does not include a "super human resources" function of second-guessing an employer's legitimate management decisions. For example, over sixty years ago, the Fifth Circuit in *NLRB v. McGahey* stated:

> But as we have often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids.

233 F.2d 406, 413 (5th Cir. 1956).

Here, ADT drafted its own lawful No Recording Policy to protect its own interests. Neither the ALJ nor the Board possesses any legitimate role to decide ADT interpreted its own Policy

incorrectly. If such second-guessing requires a deep dive into the nuances of state law, then the approach overreaches even further.

The Board need only determine whether the alleged discriminatees' actions enjoyed the Act's protection. That determination does not require interpretation of Respondent's policies or state law, but rather depends upon the fundamental balancing of interests inherent to the Act. Here, for the same reasons relied upon by the Board in *Boeing*, this **security company's** property interests in prohibiting surreptitious recordings far outweigh the "comparatively slight" impact on Section 7 rights. *Boeing* at **18–19.

VI. The ALJ Erroneously Found Respondent Violated the Act, Recommended a Remedy, and Issued an Order Against Respondent.

In support of its contention that Respondent has not violated the Act in any manner, and thus neither a Remedy nor an Order are appropriate, Respondent has excepted:

8. To the conclusion that ADT violated Sections 8(a)(1) and (3) of the Act by suspending and discharging the alleged discriminatees (D.16:44–17:15), because these conclusions are contrary to the substantial evidence in the record, unsupported by the record, and contrary to law.

9. To the ALJ's failure to recommend dismissal of the Complaint, as amended, in its entirety, because the failure to so recommend is contrary to the substantial evidence in the record, unsupported by the record, and contrary to law.

10. To the issuance of a Remedy (D.17:16–18:12),[4] because any Remedy is contrary to the substantial evidence in the record, unsupported by the record, and contrary to law.

11. To the issuance of a recommended Order (D.18:14–19:37), because any Order is contrary to the substantial evidence in the record, unsupported by the record, and contrary to law.

[4] This Exception includes the Appendix-Notice to Employees, appended to the end of the Decision and recommended Order.

The record evidence and above analysis demonstrates the General Counsel did not satisfy its burden to show Respondent violated the Act. As a result, the Board should issue no Remedies or Order. As Respondent's Exceptions reveal, the ALJ made numerous errors in finding violations. For these and all of the reasons discussed above, Respondent's Exceptions should be granted, the findings and conclusions of the ALJ to which Respondent has excepted should be overturned, the Board should conclude no violations of the Act occurred, and the Amended Complaint should be dismissed in its entirety with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 20th day of August 2019, the foregoing, **RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**, was emailed and filed via electronic filing with:

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